Supreme Court, U.S.
FILED
00-346 AUG 30 2000
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

NORFOLK SHIPBUILDING
& DRYDOCK CORPORATION
Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE
OF CHRISTOPHER GARRIS, DECEASED
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether Moragne v. States Marine Lines, 398 U.S. 375 (1970), a case which was superseded and reversed by Congress in 1972, created or now should be extended to create a new judge-made general maritime law wrongful death cause of action in negligence for the accidental death of a non-seaman in state territorial waters?

II. PARTIES

All parties to the proceeding below are identified in the caption of this case except E. T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action. It participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from this action, with prejudice, on May 1, 2000.

III. CORPORATE DISCLOSURE STATEMENT

The parent company of the petitioner, Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), is United States Marine Repair, Inc. No publicly held company owns 10 percent or more of NORSHIPCO's stock.

IV. TABLE OF CONTENTS

I. Question Presented i

II. Parties ii

III. Corporate Disclosure Statement ii

IV. Table of Contents iii

V. Table of Authorities v

VI. Lower Court Case Citations 1

VII. Statement of Jurisdiction 1

VIII. Constitutional and Statutory Provisions 2

A. The Death on the High Seas Act, 46 U.S.C.A. § 761 (West 1975) 2

B. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986), reprinted at App. 49 2

C. The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992) 2

D. The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999), reprinted at App. 53 3

IX. Statement of the Case 3

X. Argument 5

A. The Court Must Resolve A Schizophrenic, Three-Way Split In The Federal Courts Of Appeal And State Supreme Courts Concerning Whether Moragne Recognizes Or Should Be Extended To Recognize A Judge-Made, Wrongful Death Cause Of Action In Negligence.....5

1. Decisions Limiting Moragne To An Unseaworthiness Cause fo Action.....6

2. Decisions Limiting Moragne To An Unseaworthiness Cause Of Action, Yet Creating a New Negligence Cause of Action.....8

3. Decisions Recognizing that Moragne Itself Created a Negligence-Based Cause of Action.....9

B. The Court Must Ultimately Harmonize The Important, But Conflicting, Policies That Militate For And Against Creation Of A New, Judge-Made Remedy In This Highly Legislated Area Of The Law.....11

1. Liberal Maritime Remedies.....11

2. Federalism.....12

3. Uniformity.....13

4. Separation of Powers.....14

XI. Conclusion.....18

V. TABLE OF AUTHORITIES

Federal Cases

Capetola v. Barclay White Co., 139 F.2d 556 (3rd Cir. 1943), cert. denied, 321 U.S. 799 (1944) 13

Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, (1998) 12, 17, 18

Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983) 7, 12

Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910 (4th Cir.) cert. denied, 479 U.S. 914 (1986) 13

Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980) 7, 12

Just v. Chambers, 312 U.S. 383 (1941) 14

Matthews v. United States, 825 F.2d 35 (4th Cir. 1987) 13

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 12, 13, 15-17

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), aff'd sub. nom., Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 10

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 17

Moragne v. States Marine Lines,
398 U.S. 375 (1970) 4, 6, 11, 12, 18

Nelson v. United States, 639 F.2d 469
(9th Cir. 1980) 8, 9, 12

Parker v. South Louisiana Contractors, Inc., 537 F.2d 113
(5th Cir. 1976), cert. denied, 430 U.S. 906 (1977) 16

Scindia Steam Navigation Co., Ltd. v. De Los Santos,
451 U.S. 156 (1981) 15

The Sea Gull, 21 F. Cas. 909 (C.C.Md. 1865) 11

The Tungus, 358 U.S. 588 (1959) 14, 16

Wahlstrom v. Kawasaki Heavy Industries, Ltd.,
4 F.3d 1084 (2d Cir. 1993), cert. denied, 510
U.S. 1114 (1994) 10

Western Fuel Co. v. Garcia, 257 U.S. 233
(1921) 14

Yamaha Motor Corp., U.S.A. v. Calhoun,
516 U.S. 199 (1996) 5, 9, 13, 14, 18

State Cases

Brown v. Brown, 309 S.E.2d 586 (Va. 1983), cert. denied
467 U.S. 1242 (1984) 7, 12

General Chemical Corp. v. De La Lastra, 852 S.W.2d
916 (Tex.), cert. dismissed, 510 U.S. 985 (1993) 10, 11

Leone v. Columbia Sussex Corp., 610 N.Y.S.2d
586 (N.Y. App. Div. 1994) 13

Torch Operating Co. v. Bartell, 865 S.W.2d 552 (Tex. Ct. App. 1993) 13

Walker v. United States Workers, Inc., 606 So.2d 1243 (Fla. Dist. Ct. App. 1992) 13

Federal Statutes

28 U.S.C.A. § 1254 (1) (West 1993) 1

The Death on the High Seas Act, 46 U.S.C.A. § 761 (West 1975) 2, 16

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905 (a)-(b), 909 (West 1986) 2, 6, 15, 18

State Statutes

The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992). 2

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302,-307, -512, -515, -516 (Michie 1995 & Supp. 1999) 3, 12

Other Authorities

82 Am. Jur. 2d, *Workers' Compensation* § 71, at 78 (1992) 13

1 Steven F. Friedell, Benedict on Admiralty § 105 n.19 (7th ed. 1999) 16, 17

1A Richard Zaide, Benedict on Admiralty, §§ 2-12 (7th ed. 1997) 15

Boating Statistics 1998, United States Coast Guard, COMDTPUB P16754.12, pp. 9, 29 11

H.R. Rep. No. 92-1441 (1972), 1972 U.S.C.C.A.N. 4698 16

Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-32, at 368 (2d ed. 1975) 7

1 Martin J. Norris, The Law of Maritime Personal Injuries § 3:25, at 101 (4th ed. 1990) 18

United States Department of Labor, Bureau of Labor Statistics, Table A-10, Fatal Occupational Injuries by Industry, 1993-98 11

VI. LOWER COURT CASE CITATIONS

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix 1, and is reported at 210 F.3d 209 (4th Cir. 2000).

The opinion of The Honorable Cynthia Holcomb Hall, United States Circuit Court Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation and concurring in the judgment of the Fourth Circuit appears at Appendix 28, and is reported at 210 F.3d 209, 222 (4th Cir. 2000).

The opinion of The Honorable H. Emory Widener, Jr., dissenting to the Fourth Circuit's denial of NORSHIPCO's petition for rehearing en banc appears at Appendix 41.

The opinion of the United States District Court for the Eastern District of Virginia appears at Appendix 44, and is reported at 1999 A.M.C. 769 (E.D. Va. 1998)

VII. STATEMENT OF JURISDICTION

The petitioner, NORSHIPCO, seeks review of an opinion issued by the United States Court of Appeals for the Fourth Circuit on April 3, 2000. NORSHIPCO timely filed with the Court of Appeals a Petition for Rehearing En Banc, and the Court of Appeals issued an Order denying the Petition for Rehearing En Banc on June 1, 2000. This Court has jurisdiction to issue a writ of certiorari pursuant to 28 U.S.C.A. § 1254(1) (West 1993).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The Death on the High Seas Act, 46 U.S.C.A. § 761 (West 1975).

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

B. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986), reprinted at App. 55.

C. The Virginia Wrongful Death Act, Va. Code Ann. § 8.01-50(A) (Michie 1992).

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and

in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

D. The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999), reprinted at App. 59.

IX. STATEMENT OF THE CASE

The Incident. On April 8, 1997, Christopher Garris suffered fatal injuries while working onboard the *USNS Major Stephen W. Pless*. App. 3. At the time of the incident, the vessel was docked in navigable waters at NORSHIPCO. App. 2. Tidewater Temps, Inc. employed Christopher Garris to perform sand-blasting work for Mid-Atlantic Coatings, Inc. Id. Mid-Atlantic Coatings, Inc. served as a subcontractor of NORSHIPCO. App. 3

Plaintiff's State and Federal Remedies. Christopher Garris's mother, Celestine Garris ("Garris"), collected statutory death benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). App. 3. In addition to her LHWCA recovery, Garris filed a civil action against NORSHIPCO and Gresham in the United States District Court for the Eastern District of Virginia. Id. Garris asserted two claims: (1) a purported general maritime law wrongful death claim alleging negligence

and (2) a state law negligence claim under the Virginia Wrongful Death Act. App. 3, 53. Garris alleged in her complaint that the district court had jurisdiction pursuant to 28 U.S.C. § 1333. App. 52.

The District Court Dismissal. NORSHIPCO and Gresham moved to dismiss both claims. App. 44. The district court dismissed the federal maritime claim with prejudice, holding that Moragne v. States Marine Lines, 398 U.S. 375 (1970), did not create a cause of action for the death of a non-seaman in state territorial waters resulting from negligence and that no such cause of action existed under general maritime law. App. 44-50. The district court declined to exercise supplemental jurisdiction over Garris's state wrongful-death claim and dismissed that claim without prejudice. App. 50.

Conflicting Analysis On Appeal. Garris appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel heard the appeal. In the panel decision, two judges "agree[d] with the district court and conclude[d] that Moragne did not recognize a general maritime law cause of action for wrongful death based upon negligence." App. 19. Moragne, the two-judge panel decision held, "was, both at its heart and in its facts, an unseaworthiness case." Id. The panel decision goes on, however, to create a new general maritime law negligence-based remedy for wrongful death. App. 19-27. In creating this new remedy, the panel decision relies expressly on the "principles of uniformity and consistency" found in Moragne. App. 20.

The third member of the panel wrote a concurring opinion agreeing with the judgment but arguing that "Moragne itself created a cause of action for negligence-based wrongful death." App. 28 (Hall, J., concurring). Thus, the concurring opinion argues that the Court of

Appeals did not need to create a new maritime law remedy because Moragne had already done so. Id.

NORSHIPCO timely filed a petition for rehearing en banc. App. 39. Although NORSHIPCO failed to obtain a majority vote in favor of rehearing, Judges Widener and Niemeyer did vote for rehearing. App. 40.

A Vociferous Dissent. Judge Widener wrote a dissenting opinion to the denial of rehearing. App. 41. In his opinion, Judge Widener argued that the panel's reliance upon Moragne is misplaced because the 1972 amendments to the LHWCA effectively "superseded and reversed" Moragne. App. 42. Judge Widener further argued that "the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended" when it passed the 1972 amendments to the LHWCA. App. 43.

X. ARGUMENT

A. The Court Must Resolve A Schizophrenic, Three-Way Split In The Federal Courts Of Appeal And State Supreme Courts Concerning Whether Moragne Recognizes Or Should Be Extended To Recognize A Judge-Made, Wrongful Death Cause Of Action In Negligence.

In Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), the Court held that Moragne did not preempt "all previously available state remedies." 516 U.S. at 209. In other words, the Court addressed "what, if anything, [Moragne] removed from admiralty's stock." Id. at 210 n.7. The Court expressly reserved the question of "what Moragne added to the remedial arsenal in maritime cases . . . ." Id. This is the exact question presented here:

whether after Moragne — and after Congress's unambiguous rejection of Moragne in 1972 — the maritime remedial arsenal includes a judge-made, wrongful death cause of action in negligence predicated on the scuttled ruins of Moragne.

Thirty years have passed since the Court decided Moragne. During this time, the Federal Courts of Appeal and State Supreme Courts have struggled to distill its holding and remaining relevance. The courts addressing the scope of the cause of action created by Moragne are split three ways. This tripartite split results from (1) conflicting signals within Moragne about the scope of its holding;[1] (2) the impact of the 1972 amendments to the LHWCA overruling Moragne on its facts by prohibiting an unseaworthiness cause of action by longshoremen and harbor workers, see 33 U.S.C.A. § 905(b) (West 1986); and (3) conflicting policy considerations, including the historic admiralty policy favoring liberal remedies, the need for uniformity, federalism, and separation of powers.

1. Decisions Limiting Moragne To An Unseaworthiness Cause Of Action.

The Fifth and Eleventh Circuits, as well as the Supreme Court of Virginia, restrict Moragne to its holding

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[1] Under the facts of Moragne, the Court had only an unseaworthiness claim before it. 398 U.S. at 376. Nonetheless, the Court employed broader language in parts of its opinion. For instance, the Court granted certiorari in Moragne "to reconsider the important question of *remedies* under federal maritime law for tortious deaths on state territorial waters." Id. at 377 (emphasis added). Furthermore, the Court held: "We accordingly overrule The Harrisburg, and hold that an action does lie under general maritime law for death caused by violation of *maritime duties*." Id. at 409 (emphasis added). Of course, while unseaworthiness was a maturing maritime concept in 1970, there was and is nothing uniquely maritime about negligence.

and recognize that it created only an unseaworthiness cause of action. The en banc Fifth Circuit, in Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 527 (5th Cir. 1979), cert. denied, 446 U.S. 956 (1980), considered whether a Jones Act seaman could supplement his Jones Act recovery by stating a "Moragne-engendered *negligence* action." 606 F.2d at 527 (emphasis in original). The court held that the seaman could not state the Moragne claim because "Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness." Id.

The Eleventh Circuit followed Ivy in Ford v. Wooten, 681 F.2d 712 (11th Cir. 1982), cert. denied, 459 U.S. 1202 (1983). Ford addressed whether a nonseafarer's estate's wrongful death claim under general maritime law was "restricted to a claim of unseaworthiness [or] encompassed negligence as well." 681 F.2d at 714. Like the Fifth Circuit in Ivy, the Eleventh Circuit concluded that Moragne was an unseaworthiness — not a negligence — case. Id. at 716. It therefore considered "whether Moragne should be *extended* to permit recovery under general maritime law for wrongful death caused by negligence." Id. (emphasis added). The Eleventh Circuit declined to create the negligence-based remedy requested. Id.[2]

Likewise, the Virginia Supreme Court, in Brown v. Brown, 309 S.E.2d 586 (Va. 1983), cert. denied, 467 U.S.

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[2] The Eleventh Circuit in Ford recognized but declined to follow "Gilmore & Black's unsubstantiated assertion that negligence is actionable under Moragne." Ford, 681 F.2d at 716 n.4 (citing Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-32, at 368 (2d ed. 1975)).

1242 (1984), held that Moragne was limited to an unseaworthiness cause of action.

> We believe it is clear from the history of Moragne en route to the Supreme Court, and from the treatment it received on arrival there, that, as the Eleventh Circuit Court of Appeals stated in [Ford], "the Moragne remedy applies only to unseaworthiness." And, as the Fifth Circuit said in [Ivy], "Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness."

309 S.E.2d at 590 (internal citations omitted).

2. Decisions Limiting Moragne To An Unseaworthiness Cause Of Action, Yet Creating A New Negligence Cause Of Action.

The Fourth and Ninth Circuits agree with Ivy, Ford, and Brown that Moragne created only an unseaworthiness remedy. See Garris v. Norfolk Shipbuilding & Drydock Corp., App. 1, 19 (4th Cir. 2000); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980).[3] These courts, nevertheless, apparently perceived a need for a Moragne-like negligence remedy and have both created for their circuits a general maritime law wrongful death cause of action in negligence based on the salvaged remnants of Moragne.

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[3] But see Garris, App. 34 (concurring opinion of Judge Hall of the Ninth Circuit disputing the Fourth Circuit's determination in Garris that Nelson held that Moragne created only an unseaworthiness cause of action).

In Nelson, the Ninth Circuit granted the wife of a seaman who died while working on a construction project a Moragne-like cause of action against the United States. 639 F.2d at 473. Without further analysis, the court held that "the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes." Id.[4]

The Fourth Circuit in this case likewise concluded that "Moragne was a limited holding that came in response to a set of concerns that arose specifically in the context of unseaworthiness." App. 16. Thus, under Moragne Garris's harbor-worker-decedent had no general maritime law remedy against NORSHIPCO. The Fourth Circuit, nevertheless, concluded that the "principles of uniformity and consistency that formed the basis of Moragne" warranted the creation of a Moragne-like remedy sounding in negligence. App. 20.

3. Decisions Recognizing that Moragne Itself Created A Negligence-Based Cause of Action.

A third line of decisions — from the Second and Fifth[5] Circuits and the Supreme Court of Texas — conclude that Moragne created *both* an unseaworthiness and a negligence remedy. The Second Circuit, in

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[4] The Ninth Circuit's mistaken analysis was exposed in 1996 when Yamaha confirmed that state wrongful death remedies are *not* excluded by federal maritime law in state territorial waters. 516 U.S. at 214-15.

[5] As explained by Judge Hall in her concurring opinion in this case, the Fifth Circuit "appears to find itself on [two] sides of a circuit split." App. 35-36 n. 4.

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2d Cir. 1993), cert. denied, 510 U.S. 1114 (1994), addressed whether the family of a pleasure-boater could bring a general maritime law cause of action against the manufacturer of the jet ski the decedent was operating at the time of his death. 4 F.3d at 1086. The Second Circuit recognized that on its facts Moragne was solely an unseaworthiness case. Id. at 1088. Nonetheless, the Second Circuit held that "the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law." Id. at 1088-89.

A panel of the Fifth Circuit, in Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), aff'd sub nom., Miles v. Apex Marine Corp., 498 U.S. 19 (1990), found that Moragne created both an unseaworthiness and a negligence remedy. While discussing the proper scope of damages available to a deceased seaman's mother — and without detailed analysis of the issue — the Fifth Circuit panel stated that "[i]n Moragne, the Supreme Court recognized a wrongful death action for negligence and unseaworthiness under the general maritime law." Miles, 882 F.2d at 985.

Also without detailed analysis, the Supreme Court of Texas, in General Chemical Corp. v. De La Lastra, 852 S.W.2d 916 (Tex.), cert. dismissed, 510 U.S. 985 (1993), held that Moragne created a negligence cause of action. 852 S.W.2d at 919. The Supreme Court of Texas permitted the personal representatives of two deceased shrimp boat workers to pursue a general maritime law

negligence claim against the manufacturer of a chemical allegedly causing the workers' deaths. Id. 917, 919.[6]

B. The Court Must Ultimately Harmonize The Important, But Conflicting, Policies That Militate For And Against Creation Of A New, Judge-Made Remedy In This Highly Legislated Area Of The Law.

1. Liberal Maritime Remedies.

As echoed in Moragne, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy . . . ." Moragne, 398 U.S. at 387 (citing The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865)). The Fourth Circuit relied upon this historic policy statement in creating a new remedy for Garris to assert against NORSHIPCO. App. 20.

This Court's more recent maritime law decisions, however, recognize that the liberal policies echoed in Moragne are outdated. "We no longer live in an era when seamen and their loved ones must look primarily to the

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[6] Inevitably, the federal and state courts that have not considered the extent of Moragne will be faced with the issue sometime in the future. Between 1993 and 1998, 91 workers involved in marine cargo handling and 105 workers involved in ship and boat building and repairing sustained fatal occupational injuries. United States Department of Labor, Bureau of Labor Statistics, Table A-10, Fatal Occupational Injuries by Industry, 1993-98 (http://stats.bls.gov/special.requests/ocwc/oshwc/cfoi/cftb0121.txt). During this same time period, more than 4,500 recreational boaters were killed in state territorial waters. Boating Statistics 1998, United States Coast Guard, COMDTPUB P16754.12, pp. 9, 29. These numbers ensure that the ambiguities presented by Moragne will continue to vex the lower federal courts and state supreme courts for some time to come, absent a determination by this Court.

courts as a source of substantive legal protection from injury or death . . . ." Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990). "Congress and the States have legislated extensively in these areas." Id. "In this era," this Court has cautioned, "an admiralty court should look primarily to these legislative enactments for policy guidance." Id.; see Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 121-22 (1998) (looking to Congressional guidance provided in DOHSA).

2. Federalism.

The undermining of state legislative enactments by a judge-made cause of action implicates federalism concerns. Moragne itself recognized that "[i]n the United States, every State today has enacted a wrongful-death statute." 398 U.S. at 390. "[T]he primary basis of recovery under state wrongful-death statutes [is] negligence." Id. at 398. Moragne, it has been held, created only an unseaworthiness cause of action to supplement the negligence cause of action granted by the legislature of every state. See Garris, App. 19; Ford, 681 F.2d at 714; Nelson, 639 F.2d at 473; Ivy, 606 F.2d at 527; Brown, 309 S.E.2d at 590.

While each state grants a negligence-based wrongful death cause of action, each state also regulates when the cause of action may be brought. For example, the General Assembly of Virginia forbids wrongful death claims against a decedent's employer and, in appropriate cases, the employer's upstream contractors. Va. Code Ann. §§ 65.2-302, -307 (Michie 1995 & Supp. 1999), reprinted at App. 59-60. Here NORSHIPCO may have been able to successfully defend Garris's Virginia Wrongful Death Act claim if she had pursued it. App. 22-23. Similarly, legislation in other states limits wrongful death claims — in favor of workers' compensation remedies —

against an employee's employer and, in certain cases, appropriate upstream contractors providing the employment. See, e.g., 82 Am. Jur. 2d, *Workers' Compensation* § 71, at 78 (1992); Leone v. Columbia Sussex Corp., 610 N.Y.S.2d 586, 587 (N.Y. App. Div. 1994); Torch Operating Co. v. Bartell, 865 S.W.2d 552, 555 (Tex. Ct. App. 1993) (discussing Louisiana law); Walker v. United Steel Workers, Inc., 606 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992); Matthews v. United States, 825 F.2d 35, 36-37 (4th Cir, 1987) (discussing Maryland law); Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910, 912 (4th Cir.) (discussing South Carolina law), cert. denied, 479 U.S. 914 (1986); Capetola v. Barclay White Co., 139 F.2d 556, 559-60 (3rd Cir. 1943) (discussing Pennsylvania law), cert. denied, 321 U.S. 799 (1944). The judge-made remedy granted by the Fourth Circuit in this case trumps these state statutes by granting an additional remedy where state legislatures have concluded that one should not exist.

3. Uniformity.

The Fourth Circuit believed that admiralty's "principles of uniformity and consistency" permitted it to create a new remedy despite the Virginia rule limiting Garris's remedy. To the contrary, however, this Court and Congress have consistently recognized that admiralty's goal of uniformity is subservient to state policies in state territorial waters. In Miles, the Court opined that state statutes are "sufficient" to provide a negligence-based wrongful death remedy where they apply in state waters. 498 U.S. at 25. "Variations" in state wrongful-death law have "long been deemed compatible with federal maritime interests." Yamaha, 516 U.S. at 211. These variations operate at the local level and do not impact on maritime law's "proper harmony and uniformity in its international

and interstate relations." Just v. Chambers, 312 U.S. 383, 389 (1941). Accordingly, "[t]here is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law." The Tungus, 358 U.S. 588, 594 (1959). This would appear particularly true when addressing remedies of non-seamen.

The Court recently reaffirmed this principle in Yamaha by holding that state wrongful death law, rather than a uniform federal rule, should apply to a jet-skiing accident in the territorial waters of Puerto Rico. 516 U.S. at 216. The Court

> concluded that extending state wrongful death statutes to fatal accidents in territorial waters [is] compatible with substantive maritime policies: "The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Id. at 207 (quoting Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921)). In short, therefore, uniformity concerns are not paramount when dealing with the application of simple state negligence remedies to maritime torts involving non-seafarers in state territorial waters.

4. Separation of Powers.

While state statutes implicate federalism concerns, Congressional enactments implicate separation of powers concerns. "Congress retains superior authority" in

determining maritime law remedies. Miles, 498 U.S. at 27. "[A]n admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit [admiralty court] action." Id.

Congress has taken the lead in prescribing remedies for longshoremen and harbor workers. It enacted the LHWCA which in its current version provides a comprehensive workers' compensation scheme for longshoremen and harbor workers. See 1A Richard Zaide, Benedict on Admiralty §§ 2-12 (7th ed. 1997) (discussing the LHWCA's development and scope of coverage). When in 1970 the Court created the Moragne unseaworthiness remedy for longshoremen and harbor workers, Congress promptly overruled Moragne by enacting 33 U.S.C. § 905(b) as part of the 1972 amendments to the LHWCA. This provision "specifically eliminates the right of longshoremen and harbor workers to recover against the vessel on the basis of unseaworthiness." App. 42 (Widener, J. dissenting from denial of rehearing en banc) (citing Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 165 (1981)).

In addition to legislatively overruling the remedy that Moragne granted, Congress expressed its intention in the legislative history of the 1972 amendments that admiralty remedies should not supplement the LHWCA or existing state law remedies. In passing § 905(b), Congress intended to

> place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any

> special maritime theory of liability or cause of action under whatever *judicial nomenclature* it may be called, such as "unseaworthiness," "non-delegable duty," or the like.

H.R. Rep. No. 92-1441 (1972), 1972 U.S.C.C.A.N. 4698, 4703. "Taken as a whole," therefore, "the manifest purpose of section 905(b) is to curtail rather than expand the availability of third party actions in admiralty." Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 117 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977).

Congress also prescribes general wrongful death remedies for deaths occurring outside state territorial waters. See 46 U.S.C.A. § 761 (West 1975). The Death on the High Seas Act ("DOHSA") provides a negligence-based wrongful-death cause of action for deaths "occurring on the high seas beyond a marine league from the shore of any State . . . ." Id. Why would Congress create a negligence-based wrongful death remedy applicable outside but not inside state territorial waters? "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." 1 Steven F. Friedell, Benedict on Admiralty § 105 n.19 (7th ed. 1999) (citing 59 Cong. Rec. 4482, 4886) (hereinafter "Friedell"); see The Tungus, 358 U.S. at 593 ("The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.'"). In other words, "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." Miles, 498 U.S. at 25.

Assuming as this Court did in Miles that DOHSA "both direct[s] and delimit[s]" the authority of the federal

courts to create new maritime law wrongful death remedies, 498 U.S. at 27, no new wrongful death remedy should be created for state territorial waters. When it enacted DOHSA (or even § 905(b) of the LHWCA) Congress certainly could have created the very negligence-based remedy the Fourth Circuit created for Garris in this case. Congress, however, chose not to do so. Congress's "considered judgment," Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978), was "not to intrude on state legislative competence" in state territorial waters, Friedell § 105 n.19, "because it believed state statutes sufficient in those areas." Miles, 498 U.S. at 25.

Much has changed since this Court decided Moragne. As Miles explained: "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." 498 U.S. at 36. The Court's recent decision in Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116 (1998), epitomizes this change. In Dooley, the Court cautioned against erecting new judge-made maritime remedies in close proximity to established statutory remedies. Because Congress did not create a survival action in DOHSA, the Court declined the invitation to create a general maritime law survival action in Dooley. 524 U.S. at 122-24. DOHSA, the Court held, "expresses Congress' considered judgment on the availability and contours of a survival action in cases of death on the high seas." Id. at 124 (internal quotation marks & citation omitted). "Because Congress has already decided these issues, it has precluded the judiciary from enlarging" the available remedies by creating a new cause of action. Id. at 123. The Court in Dooley concluded, "[e]ven in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by

authorizing a *cause of action* with which Congress was certainly familiar but nonetheless declined to adopt." Id. at 124 (emphasis added).

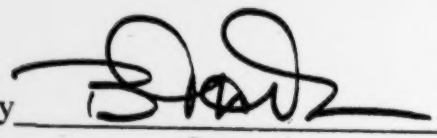
"Because Congress has already decided" not to legislate a negligence-based wrongful death remedy for harbor workers in state waters, a federal court should not create one on its own accord. Id. at 123-24. In DOHSA, Congress struck a balance between granting a uniform remedy for the high seas and withholding a remedy for state territorial waters. See Moragne, 398 U.S. at 397-98. Congress intentionally "fail[ed] to extend [DOHSA] to cover such deaths primarily" because state laws provided an adequate remedy in state waters and because Congress wanted to avoid any question of state law preemption. Id. at 397. By creating the new remedy here, the Fourth Circuit violated Dooley's clear instruction — "[e]ven in the exercise of . . . admiralty jurisdiction, [do] not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." Dooley, 524 U.S. at 124. Judge Widener's compelling dissent underscores this point: "In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress." App. 43.

XI. CONCLUSION

For purposes of its decision in Yamaha, the Court assumed without deciding that a non-seafarer in territorial waters could bring a Moragne wrongful death action. See Yamaha, 516 U.S. at 210 n.7. Because non-seafarers are not owed a duty of seaworthiness, see 33 U.S.C.A. § 905(b) (West 1986); 1 Martin J. Norris, The Law of Maritime Personal Injuries § 3:25, at 101 (4th ed. 1990), the Court had to assume the existence of a negligence-

based wrongful death cause of action. The validity of this assumption has been debated in the federal courts of appeals and state supreme courts ever since the Court decided Moragne. As demonstrated by the tripartite split, these courts have reached no consensus on whether such a remedy exists. And given the conflicting — yet weighty — policy considerations underlying any decision to grant such a remedy, it is not likely that a consensus will ever be reached without this Court's intervention. Thirty years of ambiguity regarding this important issue is long enough. Accordingly, NORSHIPCO respectfully requests that this Court grant certiorari in this case to resolve the intractable split in authorities over the scope of Moragne and resolve the significant (and conflicting) policy considerations implicated when a federal court creates a new maritime law remedy governing negligent wrongful death in state territorial waters.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

By 
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August 30, 2000